

# EXHIBIT 29

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Trustee of John L. Bitter Irrevocable Life Insurance Trust

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GREGORY P. BARNES, JR., TRUSTEE OF  
JOHN L. BITTER IRREVOCABLE LIFE  
INSURANCE TRUST,

Case No.: 4:13-cv-01878-YGR

Plaintiff,

vs.

WINDSOR SECURITIES, LLC; and  
PACIFIC LIFE INSURANCE COMPANY,

Defendants.

PACIFIC LIFE INSURANCE COMPANY,

Cross-Claimant,

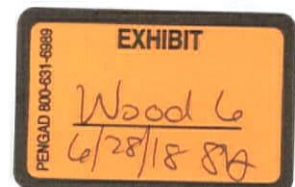
vs.

GREGORY P. BARNES, JR., TRUSTEE OF  
JOHN L. BITTER IRREVOCABLE LIFE  
INSURANCE TRUST; and WINDSOR  
SECURITIES, LLC,

Cross-Defendants.

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
FOR JUDGMENT ON THE PLEADINGS**

Date: July 16, 2013  
Time: 2:00 p.m.  
Courtroom: 5  
Honorable Yvonne Gonzales Rogers



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United States District Court, Northern District  
of California, Local Civil Rule No. 7.5(a)

3

1 Defendant, Windsor Securities, LLC ("Windsor"), has moved for judgment on the  
2 pleadings with reference to the Cross-Complaint For Interpleader (the "Interpleader Cross-  
3 Complaint") filed herein by cross-complainant Pacific Life Insurance Company ("Pacific"). The  
4 Interpleader Cross-Complaint was filed in response to the complaint of plaintiff, Gregory P.  
5 Barnes, Jr., Trustee of John L. Bitter Irrevocable Life Insurance Trust ("Barnes"), for a declaratory  
6 judgment as to whether Barnes or Windsor was entitled to receive the death benefit funds payable  
7 under a policy issued by Pacific. Pacific is, by definition, a mere stakeholder of those funds.

8 Windsor, by its motion for judgment on the pleadings against Pacific (the "MJP"), asks the  
9 Court to summarily determine – without considering in any way the claims and factual issues  
10 concerning entitlement that have been raised by Barnes and that form the basis of this action – that  
11 the death benefit funds sought by Barnes should be immediately paid to Windsor. (MJP, 7:6-8.)  
12 But it is Barnes – the party seeking not only to obtain those funds but also to prevent their  
13 dissipation by Windsor while entitlement thereto is being determined – and not Pacific, a mere  
14 stakeholder, that has a vital interest in the outcome of the motion. In order to protect that vital  
15 interest, Barnes hereby respectfully submits the following opposition to the MJP. Barnes requests  
16 that the Court, in recognition of the fact that Barnes is the real party in interest on the MJP,  
17 consider the facts and law set forth in Barnes's opposition, below, in connection with its  
18 consideration of the MJP.

19 **A. THE MJP IS BASED ALMOST ENTIRELY ON MATERIAL THAT IS OUTSIDE**  
20 **THE INTERPLEADER CROSS-COMPLAINT OR OTHERWISE**  
21 **INADMISSIBLE AND THAT SHOULD THEREFORE BE STRICKEN AND/OR**  
22 **DISREGARDED BY THE COURT**

23 As a threshold matter, the MJP is replete with – indeed is based almost entirely upon –  
24 documentary materials and purported statements of fact that: (1) are not included in or attached to  
25 the Interpleader Cross-Complaint (or, for that matter, in or to Barnes's first amended complaint  
26 herein [the "FAC"]); (2) are not referred to in the Interpleader Cross-Complaint (or, for that matter,  
27 in the FAC); and (3) even if they had been referred to therein, are not crucial to Pacific's claims as  
28 set forth in the Interpleader Cross-Complaint (or, for that matter, to Barnes's claims as set forth in  
the FAC). All such materials and statements should be stricken and/or disregarded by the Court

1 in its consideration of the MJP. *Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d  
 2 912, 925 (9<sup>th</sup> Cir. 2001) (generally, unless the Court converts a Rule 12(b)(6) motion into a motion  
 3 for summary judgment, it cannot consider materials outside the complaint); *United States v.*  
 4 *Corinthian Colleges*, 655 F.3d 984, 999 (9<sup>th</sup> Cir. 2011) (documents not physically attached to the  
 5 complaint may not be considered by the court if they have not been referred to therein); *Coto*  
 6 *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9<sup>th</sup> Cir. 2010) (“mere mention of the existence of a  
 7 document in a complaint is insufficient to incorporate the contents of a document”); *Parrino v.*  
 8 *FHP, Inc.*, 146 F.3d 699, 705-706 (9<sup>th</sup> Cir. 1998) (documents not attached to a complaint but  
 9 referred to therein may be considered by the court on a Rule 12(b)(6) motion only if those  
 10 document are “crucial to plaintiff’s claims”); *Fleming v. Packard*, 581 F.3d 922, 925 (9<sup>th</sup> Cir.  
 11 2009) (abovementioned standards for Rule 12(b)(6) motion apply with equal force to motion for  
 12 judgment on the pleadings under Rule 12(c)); *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419,  
 13 422 (2d Cir. 2011) (same rule, with explicit reference to purported evidence outside the  
 14 complaint).<sup>1</sup>

15 Similarly, none of the documentary materials attached to the MJB are authenticated and  
 16 none of the purported statements of fact therein are contained in or supported by affidavit or  
 17 declaration. All such materials and statements should, again, be stricken and/or disregarded by  
 18 the Court. Federal Rules of Evidence, Rule 901(a), (b)(1) (requirement that documents be  
 19 authenticated by, e.g., testimony of witnesses with personal knowledge of their authenticity);  
 20 United States District Court, Northern District of California, Civil Local Rule No. 7-5(a)  
 21 (“evidentiary matters must be appropriately authenticated by an affidavit or declaration”); United  
 22 States District Court, Northern District of California, Civil Local Rule No. 7-5(a) (“[f]actual  
 23 contentions made in support of or in opposition to any motion must be supported by an affidavit  
 24 or declaration”).

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25  
 26 <sup>1</sup> Should the Court nevertheless decide to consider some or all that evidence, Barnes,  
 27 as real party in interest on the MJP, has requested that he be granted the opportunity to obtain  
 28 and present counter-evidence. See Plaintiff’s Request, Should The Court Decide To  
 Consider Extrinsic Evidence Presented In Support Of Defendant’s Motion For Judgment On  
 The Pleadings, For Opportunity To Obtain And Present Counter Evidence, filed herewith.

1 Barnes has objected to, and requested that the Court strike and/or disregard, all such  
2 documentary materials, all such purported statements of fact, and all portions of the MJP that cite  
3 to or rely upon them. (*See* Plaintiff's Objections To Purported Evidence Submitted By Defendant  
4 In Support Of Defendant's Motion For Judgment On The Pleadings; Request To Strike, filed  
5 herewith ["Pl. Obj."]). The documents attached to, and portions of, the MJP that should thus be  
6 stricken and/or disregarded are as follows:

- 7 1. (a) Pacific Life Insurance Policy attached as Exhibit 1 to MJP [Document 19.1  
8 in the Court's file].  
9 (b) MJP, 3:1-9, beginning with "Accepting" and ending with "the Policy."  
10 MJP, 3:20-4:22., beginning with "A true" and ending with "(emphasis  
11 added)."  
12 (Pl. Obj., 2:26-3:10; 10:26-11:3.)
- 13 2. (a) Letter from Pacific dated November 11, 2010, attached as Exhibit 2 to MJP  
14 [Document 19.2 in the Court's file].  
15 (b) MJP, 4:25-5:1, beginning with "As pleaded" and ending with "Policy."  
16 MJP, 6:18-21, beginning with "As confirmed" and ending with "Proceeds."  
17 (Pl. Obj., 3:12-4:14; 11:4-7.)
- 18 3. (a) "Ownership, Name, or Beneficiary Change Request" attached as Exhibit 3  
19 to MJP [Document 19.3 in the Court's file].  
20 (b) MJP, 3:9-12, beginning with "Just" and ending with "Windsor."  
21 MJP, 5:2-6, beginning with "On or about" and ending with "the Policy."  
22 MJP, 6:21-25, beginning with "Moreover" and ending with "Windsor."  
23 (Pl. Obj., 4:16-5:19; 11:8-12.)
- 24 4. (a) Allegation of Pacific at ¶ 10 of the Interpleader Cross-Complaint  
25 [Document 1 in the Court's file, at Exhibit 2 thereto], ¶ 10, 3:10-12, that  
26 "Pacific Life is informed and believes and thereon alleges that on or about  
27 November 11, 2011, the Policy's named beneficiary designation was  
28 changed from the Trust to Windsor."

- 1 (b) MJP, 3:8-9, beginning with “Pursuant” and ending with “2010.”  
 2 MJP, 4:25-27, beginning with “As pleaded” and ending with “at ¶ 10.”  
 3 MJP, 6:7-25, beginning with “There is” and ending with “Windsor.”

4 (Pl. Obj., 5:21-8:8; 11:13-20.)

- 5 5. (a) Statement at MJP, 4:24-25 that “Following a default by the Bitter Trust  
 6 under the terms of a separate agreement between the Bitter Trust and  
 7 Windsor, Windsor was substituted as beneficiary under the policy.”

- 8 (b) MJP, 3:8-9, beginning with “Pursuant” and ending with “2010.”  
 9 MJP, 4:24-25, beginning with “Following” and ending with “Policy.”

10 (Pl. Obj., 8:10-9:14; 11:21-25.)

- 11 6. (a) Statement at MJP, 5:21-23 that “Prior to its amendment, Plaintiff Bitter  
 12 Trust has moved to compel arbitration with Windsor relating to claims  
 13 under a separate agreement between the Bitter Trust, the Insured, and  
 14 Windsor.”

- 15 (b) MJP, 5:21-23, beginning with “Prior to” and ending with “and Windsor.”  
 16 MJP, 6:28-7:4, beginning with “This” and ending with “Court.”

17 (Pl. Obj., 9:16-10:20; 11:26-12:4.)

18 **B. THE MJP HAS NO BASIS IN LAW AND SHOULD BE DENIED OUT OF HAND**

19 Windsor grounds the MJP on a single, spurious claim: that Pacific, by alleging on  
 20 information and belief that “on or about November 11, 2011, the Policy’s named beneficiary  
 21 designation was changed from the Trust to Windsor,” has somehow rendered the Interpleader  
 22 Cross-Complaint invalid as a matter of law. Windsor essentially contends (1) that Pacific has by  
 23 this allegation “admitted” that it believes Windsor is entitled to the disputed funds, and (2) that  
 24 Pacific must therefore immediately pay those funds to Windsor. (MJP, 6:7-13.)

25 As a preliminary matter, the allegation in question – like all of the other extrinsic  
 26 documents and purported statements of fact proffered by Windsor – is inadmissible and cannot  
 27 properly be used as a basis for the MJP. (See Pl. Obj., 5:21-8:8.) This is particularly so because  
 28 Windsor has unequivocally denied that allegation in its answer to the Interpleader Cross-

Complaint (Answer Of Cross-Claim Defendant Windsor Securities LLC To Cross Complaint [Document 5 in the Court's file], 2:15), and should be barred from now seeking to ground the MJP on the purported truth thereof. *American Title Insurance Company v. Lacelaw Corporation*, 861 F.2d 224, 225 (9<sup>th</sup> Cir. 1988) (statement in an answer is a judicial admission, conclusively binding on the party who made it).

Equally important – as Windsor disingenuously fails to mention – a stakeholder states a valid cause of action for interpleader under applicable law regardless of the stakeholder's opinion about, or its evidence concerning, which of the contesting parties is legally entitled to the money or property at issue. To put this another way, any such opinion or evidence that the stakeholder may have is irrelevant to the validity of the interpleader. This is so because the threat to a stakeholder posed by conflicting claims – *i.e.*, the very threat the interpleader is meant to alleviate – does not disappear until the court has either resolved those claims or has relieved the stakeholder of potential liability to the contesting parties by allowing the stakeholder to abandon title to the money in question and place it within the control of the court. Windsor has not offered, and cannot offer, any authority to the contrary.

### **1. The Controlling Statute.**

Pacific brought its interpleader action in state court pursuant to California Code of Civil Procedure § 386. (Interpleader Cross-Complaint [Document 1 in Court's file, at Exhibit 2 thereto], 1:15.5, 2:4.) An examination of the relevant portions of that code section demonstrates the emptiness of Windsor's argument.

(b) Any . . . entity against whom double or multiple claims are made . . . by two or more persons which are such that they may give rise to double or multiple liability, may bring an action against the claimants to compel them to interplead and litigate their several claims. When the . . . entity against whom such claims are made . . . is a defendant in an action brought upon one or more such claims, it may . . . file a verified cross-complaint in interpleader, admitting that it has no interest in the money or property claimed, or in only a portion thereof, and alleging that all or such portion is demanded by parties to such action, and apply to the court upon

1 notice to such parties for an order to deliver such money or property or such  
2 portion thereof to such person as the court shall direct . . .

3 (c) Any amount which a . . . cross-complainant admits to be payable may be  
4 deposited by him with the clerk of the court at the time of the filing of the . . .  
5 cross-complaint in interpleader . . .

6 Crucially, the statute includes no requirement that a stakeholder have a particular opinion,  
7 or be without an opinion, as to which of the contesting parties might be entitled to the money or  
8 property. This means, as noted above, that any opinion the stakeholder might hold or might  
9 express in that regard – whether in its cross-complaint or elsewhere – is irrelevant to the validity  
10 of the cross-complaint. That is, so long as the stakeholder remains subject to conflicting claims, it  
11 states a good cause of action in interpleader even it might be convinced that one party or the other  
12 should prevail.

## 13 2. The Interpleader Cross-Complaint.

14 Pacific has alleged:

15 12. On or about December 28, 2012, Windsor filed a claim with Pacific  
16 Life for the Death Benefit Proceeds due under the Policy.

17 13. In January 2013, an attorney representative for the Estate of John L.  
18 Bitter, Jr. informed Pacific Life that a representative of the Trust intended to make  
19 a claim for the Death Benefit Proceeds under the Policy.

20 14. On February 13, 2013, the Trust filed the Complaint for Declaratory  
21 Relief at issue in this case naming Windsor and Pacific Life as defendants.

22 Paragraph 6 of said complaint states:

23 The present action involves a dispute between Plaintiff and  
24 Windsor over their respective entitlements to the death benefit due  
25 under the Policy . . . . Pacific is a mere stakeholder of the death  
26 benefit due under the Policy and is named herein solely to guarantee  
27 that Pacific be bound by the determination of this court as to how  
28 that death benefit should be distributed between Plaintiff and

Windsor.

15. Pacific Life has at all time been and now is ready, willing and able to pay the Death Benefit Proceeds to the person legally entitled thereto, but by reason of conflicting claims to the Death Benefit Proceeds, Pacific Life does not know and cannot determine to whom the Death Benefit Proceeds should be paid.

....

17. The Cross-Defendants, and each of them, claim or may claim all of the Death Benefit Proceeds.

18. .... Pacific Life cannot determine which of the Cross-Defendants is entitled to payment of the Death Benefit Proceeds and cannot pay any part of that sum without danger of being compelled to pay that same part to each of the Cross-Defendants herein.

19. Pursuant to California Code of Civil Procedure section 386(c), Pacific Life has deposited with the Clerk of this Court at the time of the filing of this Cross-Complaint, there to remain subject to the outcome of this action, the sum of \$2,030,904.11 (the Interpleader Stake”), the amount which remains payable under the Policy for the Death Benefit Proceeds due plus port mortem interest. (Interpleader Cross-Complaint [Document 1 in Court’s file, at Exhibit 2 thereto], 3:15-4:20.) 1:15.5, 2:4.)

### **3. Pacific Has Stated A Valid Claim Under The Statute.**

A line-by-line comparison of the above-quoted allegations with the relevant portions of California Code of Civil Procedure § 386 makes it plain that Pacific has alleged all of the facts necessary to state a valid claim under the interpleader statute. Windsor therefore has no legal basis for the MJP. *Chavez v. United States*, 683 F.3d 1102, 1108-1109 (9<sup>th</sup> Cir. 2012) (to survive a Rule 12(c) motion, a complaint need only contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face). The single allegation on information and belief on which Windsor seeks to rely, even if it were admissible and – despite Windsor’s having unequivocally denied it – were taken as true for this purpose, cannot conceivably be thought to

1 negate any of the facts comprising the interpleader cause of action. That is because, as noted  
2 above, any belief Pacific might have about which of the contesting parties ought to get the death  
3 benefit funds is irrelevant, under the statute, to Pacific's right to the protection from those parties  
4 that interpleader provides.<sup>2</sup> Again, Windsor has not offered, and cannot offer, any authority to the  
5 contrary, and its motion for judgment on the pleadings should be denied.

6 DATED: June 21, 2013

HENNEFER FINLEY & WOOD, LLP

7 /s/ Joseph Wood  
8 Joseph Wood

9 Attorneys for Plaintiff, Gregory P. Barnes,  
10 Jr., Trustee of John L. Bitter Irrevocable Life  
11 Insurance Trust  
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25 <sup>2</sup> It need hardly be added that Pacific's alleged belief, based on unstated sources, that  
26 the Policy's beneficiary designation was changed by some unidentified person or entity, of  
27 unspecified authority, under unspecified circumstances, cannot possibly determine, as a matter  
28 of law, the issue of whether Barnes or Windsor is entitled to the death benefit funds.

PROOF OF SERVICE

Joseph Wood declares:

1. I am over twenty-one years of age and am not a party to the above-named action.

My business address is 425 California Street, Nineteenth Floor, San Francisco, CA 94104.

2. On June 21, 2013, in San Francisco, California, I served the attached

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
FOR JUDGMENT ON THE PLEADINGS

on the parties to this action.

3. Service was made by electronically filing that document with the Court to be  
served by operation of the Court's electronic filing and notice system.

I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true.

DATED: June 21, 2013

/s/ Joseph Wood  
Joseph Wood